Supreme Court, U.S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-1034

GREGORY PANKO, Petitioner

v.

MICHAEL RODAK, JR., Individually and as Clerk of the Supreme Court of the United States;

EDWARD C. SCHADE, Individually and as an Assistant Clerk of the Supreme Court of the United States, Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Gregory Panko
1352 North Bell Ave.
Chicago, Ill. 60622

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. _____

GREGORY PANKO, Petitioner

v.

MICHAEL RODAK, JR., Individually and as Clerk of the Supreme Court of the United States,
EDWARD C. SCHADE, Individually and as an Assistant Clerk of the Supreme Court of the United States, Respondents

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Petitioner asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered August 1, 1979, affirming the order of the United States District Court for the Northern District of Illinois,

Eastern Division dismissing this case in its entirety.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 606 F. 2d 168. A copy of the said opinion and of the unpublished opinion of the United States District Court for the Northern District of Illinois, Eastern Division is found in Appendix B.

JURISDICTION

Jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 1, 1979, affirming an order of dismissal of this case is conferred upon this Court by 28 U.S.C., Section 1254 (1). An extension of time of 60 days after October 30, 1979, or until December 29, 1979, within which to petition for a writ of certiorari was granted by order of the Circuit Justice on October 30, 1979.

QUESTIONS PRESENTED

The questions presented include the following:

I. Are the duties of the Clerk and an Assitant Clerk of the Supreme Court of the United States to file papers generally judicial or quasi-judicial in nature or are they generally ministerial in nature?

II. Does mandamus lie in a United States District Court to compel the Clerk and an Assistant Clerk of the Supreme Court of the United States to perform ministerial duties owing to a plaintiff pursuant to 28 U.S.C., Section 1361?

III. Are the Clerk and an Assistant Clerk of the Supreme Court of the United States monetarily liable for failure to perform ministerial duties owing to a plaintiff?

IV. Is this Court's holding in Calley v. Callaway, 423 U.S. 888, that legible typewritten or otherwise reproduced copies of nonprinted court opinions may be submitted as appendix data with respect to a petition for a writ of certiorari limited only to that case, or does it apply also to other cases?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of Amendment 5 of the Constitution of the United States, 28 U.S.C., Sections 956, 1331, 1332, 1361, and U. S. Supreme Court Rules 13 (2), 21 (3), 39, and 53 (5) are set forth in Appendix A.

STATEMENT

Petitioner brought this action in the United States District Court for the Northern District of Illinois, Eastern Division in accordance with 28 U.S.C., Sections 1361, 1331, and 1332 seeking mandamus and monetary relief, claiming in his complaint the incorrect deprivation of his rights of due process and equal protection of law provided by the 5th Amendment of the Constitution of the United States caused by respondents' failure to perform ministerial duties owing to the petitioner, the respondents being the Clerk and an Assistant Clerk of this Court.

The complaint having two counts states that in November 1976 and April 1977 respectively petitioner submitted 40 copies of a petition for a writ of certiorari for review of the case Panko v. Tagliere, No. 75-1726, from the United States Court of Appeals for the Seventh Circuit and 40 copies of a jurisdictional statement with respect to the appeal of the case Panko v. County of Cook, Illinois, No. 61941, from the Appellate Court of Illinois, First District to respondents' office along with docket fee checks. In each instance respondents retained one copy of each document and the docket fee check, but respondent Edward C. Schade at the general direction of respondent Michael Rodak, Jr. returned the other 39 copies accompanied by a letter believing that the document did not comply with Supreme Court Rule 39 governing the printing. Petitioner alleged in his complaint with respect to this action that the letters were vague and ambiguous contrary

to the 5th Amendment of the Constitution of the United States in not saying exactly in what way the respondents believed the documents did not comply with Rule 39, i.e. whether the margins were too large or too small, whether the print size was too large or too small, or whether only the appendix portions were involved. Nothing whatsoever was indicated in either letter of the need for an in forma pauperis motion in order for the respondents to accept the documents as they were submitted. From an examination of copies of documents of other cases enclosed by respondent Edward C. Schade, as well as research which the petitioner had done, it appeared that the respondents wanted the data on attached folded sheets of about letter size contained in Appendices B and C of the petition consisting of reproduced copies of the complaint, court opinions, and court orders (some of which were reduced in print size) and Appendices C and D of the jurisdictional statement consisting of reproduced copies of court orders and the notice of appeal (some of which were reduced in print size) printed in the same format as the main text. (References to some of the appendix data being reduced in print size in the complaint were parenthetical and were not intended to indicate that this was the controlling reason as to why the documents were not filed. It appeared that respondents did not wish to file the documents with some of the appendix data reproduced on attached folded sheets of about letter size.)

Petitioner resubmitted the 39 copies of the petition and jurisdictional statement respectively accompanied by covering letters and motions to dispense with printing of

portions of the appendices, which motions he wanted respondent Edward C. Schade to present to the justices of this Court. In the covering letters and in the motions petitioner indicated that legible typewritten or otherwise reproduced copies of nonprinted court opinions may be submitted with respect to a petition without the data being printed in the same format as the main text citing Calley v. Callaway, 423 U.S. 888 (1975), wherein this Court had granted a motion to dispense with printing of portions of the appendix of a petition for a writ of certiorari. In his covering letter and motion with respect to the jurisdictional statement petitioner indicated that this could likewise be applied to nonprinted orders and the notice of appeal with respect to a jurisdictional statement. He also indicated that a jurisdictional statement with respect to an appeal, Panko v. Donovan, 415 U.S. 953 (1974), with similar attachments had been previously accepted. In his motion of December 13, 1976, with respect to the petition for a writ of certiorari petitioner also indicated he was in the process of preparing a petition for leave to appeal to the Supreme Court of Illinois from the Appellate Court of Illinois regarding the case Panko v. County of Cook, Illinois, supra, the time for filing having been extended from December 1, 1976, to January 5, 1977. (Petitioner was granted leave to file the said petition instanter by the Supreme Court of Illinois later in January 1977 during its January Term.) (The parcel which contained the motion of December 13, 1976, was not claimed by anyone of respondents' office during a period of more than 30 days after a delivery attempt was made on December 18, 1976, with a

notice then left and was returned in January 1977 to Chicago, Illinois and held at a postal station. On February it was resubmitted to respondents' office without being opened and was received there on February 18, 1977.)

In his complaint petitioner alleged that instead of submitting the motions to this Court in accordance with the directive of Snider v. All State Administrators, Inc., 414 U.S. 685, 686 (1974), respondent Edward C. Schade incorrectly returned the 39 copies in each case without any covering letter whatsoever contrary to the 5th Amendment of the Constitution of the United States and the directive of Snider thus incorrectly denying petitioner due process and equal protection of law and engaging in misfeasance of office. Later, respondent Edward C. Schade or a designee returned docket fee checks with respect to both the petition and jurisdictional statement.

In addition, petitioner resubmitted the 39 copies of his petition after their second re urn by respondent Edward C. Schade along with a motion to dispense with printing of portions of the appendix and a covering letter addressed to the Circuit Justice, John Paul Stevens, asking that the said Justice or the Court grant the motion and that respondents' office be directed to properly docket the petition that petitioner might have due process of law. In his complaint petitioner alleged that respondent Edward C. Schade returned all of the transmitted items including the letter addressed to the Circuit Justice without any letter of explanation whatsoever

contrary to Amendment 5 of the Constitution of the United States.

Petitioner asked in his complaint that a mandamus issue directing respondents to docket his petition and jurisdictional statement or, in the alternative, to submit the respective motions to dispense with printing of portions of the appendices to the justices of this Court for determination. The petitioner also asked that respondents pay the petitioner for misfeasance and the incorrect deprivation of petitioner's rights of due process and equal protection of law provided by the 5th Amendment of the Constitution of the United States and resubmission postal expenses plus court costs.

On February 10, 1978, counsel for the respondents filed a motion to dismiss and on February 17, 1978, filed a memorandum in support of the said motion to dismiss wherein it was alleged that respondents were immune from monetary liability with respect to the instant case and that mandamus did not lie in the District Court with respect to the respondents. On March 24, 1978, petitioner filed with leave of the District Court a reply to the said motion to dismiss and memorandum in support thereof wherein he alleged that respondents were not immune from monetary liability with respect to the instant case and that mandamus did lie in the District Court with respect to the respondents for performance of ministerial duties. On April 14, 1978, counsel for the respondents filed a reply memorandum to petitioner's reply of March 24, 1978, and on April 25, 1978, with leave of the District Court petitioner filed a response to the reply

memorandum of April 14, 1978, of counsel for the respondents.

On July 5, 1978, an order was entered in the District Court with an accompanying memorandum dismissing the case in its entirety pursuant to defendants' motion. The Court was of the opinion that judicial or quasi-judicial immunity extended to the respondents in the exercise of discretionary authority, and that there was not a clear, ministerial, and nondiscretionary duty on respondents' behalf without an in forma pauperis showing by petitioner. On September 5, 1978, the petitioner filed a notice of appeal in the District Court with respect to the order of July 5, 1978.

Briefs were submitted by the petitioner and counsel for the respondents in the 7th Circuit Court of Appeals. On August 1, 1979, the Court of Appeals issued an order and an opinion affirming the order of the District Court. The Court of Appeals was of the opinion that respondents were performing judicial or quasi-judicial functions within their authority and had judicial immunity, and that there was not a plain duty on the part of the respondents to file any of petitioner's papers without an in forma pauperis showing by petitioner. It also held that this Court's ruling in Calley v. Callaway, supra, applied to that case alone.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS IN HOLDING THAT RESPONDENTS WERE PERFORMING JUDICIAL OR QUASI-JUDICIAL FUNCTIONS INSTEAD OF MINISTERIAL FUNCTIONS AND HAD IMMUNITY HAS DECIDED QUESTIONS OF LAW IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

Where a duty is a definite one not involving the exercise of judgment, imposed by law arising under conditions admitted or proved to exist, it is a ministerial duty (67 C.J.S., Officers, Section 112). A court clerk is a ministerial officer and may not properly assume judicial powers (Midwestern Developments, Inc. v. City of Tulsa, Oklahoma, 319 F. 2d 53 (10 Cir., 1963)). If a clerk of a court fails or refuses to perform a ministerial duty imposed on him by law resulting in injury to another, the clerk is liable in damages to the injured party (14 C.J.S., Clerks of Courts, Section 49; McLallen v. Henderson, 492 F. 2d 1298 (8 Cir., 1974); Stephen v. Drew, 359 F. Supp. 746 (E.D. Va., 1973); McGhee v. Moyer, 60 F.R.D. 578 (W.D. Va., 1973)). In McLallen v. Henderson, the 8th Circuit Court of Appeals held that court clerks did not have judicial or quasi-judicial immunity as follows:

> "[C]ourt functionaries such as clerks are not clothed in judicial immunity because their duties are ministerial, not discretionary in nature. [citation omitted] Judicial immunity is only granted to non-judicial officials who, like judges, must not be unduly inhibited to exercise discretionary

> authority by the constant fear of personal liability for damages. ... Reporters are like clerks in that their duties are ministerial in nature and thus they are not protected by quasi-judicial immunity."

The 3rd Circuit Court of Appeals in affirming an order of a district court held that a clerk of a court is essentially a ministerial officer, not vested with the authority to rule upon the character or purpose of papers tendered him to be filed, and failure to issue process to a party entitled to it may result in the clerk's liability for loss to that party (U. S. v. Bell, 127 F. 1002, 1003 (E.D. Pa., 1904); aff'd 135 F. 336 (3 Cir., 1905)). The title of an office, quasi-judicial or even judicial, does not of itself immunize the officer for unlawful acts which cannot be said to constitute an integral part of judicial process (Robichaud v. Ronan, 351 F. 2d 533 (9 Cir., 1965)). Clerks of courts are, therefore, not absolutely immune from liability for damages resulting from actions taken by them in the performance of their responsibilities.

28 U.S.C., Section 956 provides that clerks of federal courts shall exercise the powers and perform the duties assigned to them by their respective courts. U. S. Supreme Court Rules 21 (3) and 13 (2) provide for docketing a petition for a writ of certiorari or docketing an appeal respectively upon the submission of 40 copies of the respective petition or jurisdictional statement with proof of service and payment of the docket fee by a petitioner or appellant or respective counsel. In Calley v.

Callaway, supra, this Court in granting a motion to dispense with printing of portions of the appendix to a petition for a writ of certiorari held that legible typewritten or otherwise reproduced copies of non-printed court opinions may be submitted with respect to a petition for a writ of certiorari without the data being printed in the same format as the main text without specifying an in forma pauperis requirement. This could likewise be applied to nonprinted orders and the notice of appeal with respect to a jurisdictional statement. There was nothing from the respondents accompanying the returned copies of the documents prior to the filing of this action to indicate that an in forma pauperis motion was required by the respondents. Therefore, it can be assumed that this was not in point as to why respondents did not wish to file petitioner's documents. Where an in forma pauperis showing is actually required in this Court, U. S. Supreme Court Rule 53 (5) does not authorize the Clerk to reject any motion as to content for failure to contain an adequate in forma pauperis showing. It is rather discretionary with the justices of the Court as to whether or not to grant an in forma pauperis motion whose format is physically all right.

In Snider v. All State Administrators, Inc., supra, this Court specified that the Clerk will be instructed to submit a motion to dispense with printing to the Court for decision. The Clerk was not authorized to pass upon the motion or to return the motion and the document on his own without submission to the Court but was clearly directed to submit the motion to the Court for decision. Respondents, therefore, had

clear, nondiscretionary, ministerial duties to file petitioner's documents or to submit the motions to the Court for determination.

II. THE DECISION OF THE COURT OF APPEALS IN HOLDING THAT THERE WAS NOT A PLAIN DUTY ON THE PART OF RESPONDENTS TO FILE ANY OF PETITIONER'S PAPERS CONFLICTS WITH A DECISION OF THIS COURT.

The Court of Appeals in denying mandamus relief held incorrectly that there was not a plain duty on the part of respondents to file any of petitioner's papers, and that petitioner did not have a clear right to have his motions to dispense with printing [of portions of the appendices] submitted to this Court. This is in conflict with this Court's ruling in Snider v. All State Administrators, Inc., supra, wherein this Court held that the Clerk will be instructed to submit a motion to dispense with printing to the Court for decision. This Court did not authorize the Clerk's Office to determine whether or not such a motion was sufficient or to return the document in question and the motion at its discretion. In Snider this Court held that it had the authority to waive the application of particular rules in appropriate circumstances. Petitioner's situation as to the question of in forma pauperis is distinguishable from that of Snider. In Snider the petitioner there had paid the docket fee but sought to dispense completely with printing of his petition for writ of certiorari and to submit only one typewritten copy. As previously indicated, the petitioner of this case submitted 40

copies of his petition and jurisdictional statement accompanied by docket fee checks and wished to dispense only with printing of portions of the appendices. This Court had previously granted a motion to dispense with printing of portions of the appendix with respect to a petition for a writ of certiorari in Calley v. Callaway, supra, without indicating in its order the need for an in forma pauperis statement. Therefore, respondents had plain, nondiscretionary duties to file petitioner's documents or to submit the motions to the Court for determination. Petitioner had a clear right to have his documents filed or to have his motions to dispense with printing of portions of the appendices submitted to this Court for determination. Prior to the commencement of this action petitioner attempted to administratively resolve the difficulties throught correspondence. There did not appear to be the availability of another adequate legal remedy for petitioner to try to have his documents filed as they were submitted to respondents' office. 28 U.S.C., Section 1361 provides that the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Mandamus may issue to compel a clerk of a court to perform some ministerial duty which he improperly refuses to perform, such as, filing of papers properly delivered to him on tender of fees (55 C.J.S., Mandamus, Section 69 (d)). Petitioner has a clear right to the relief sought by mandamus in this action. The three elements applicable to the issuance of a mandamus, namely, (1) a clear right in the plaintiff

to the relief sought, (2) a clear duty on the part of the defendant to do the act in question, and (3) the unavailability of another adequate remedy in law (Carter v. Seamans, 411 F. 2d 767, 773 (5 Cir., 1969); Holmes v. United States Bd of Parole, 541 F. 2d 1243, 1247 (7 Cir., 1976) all exist with respect to this action.

Mandamus, therefore, lies in a United States District Court to compel the Clerk and an Assistant Clerk of the Supreme Court of the United States to perform ministerial duties owing to the petitioner.

III. THE QUESTION OF WHETHER THIS COURT'S HOLDING IN CALLEY V. CALLAWAY, 423 U.S. 888, APPLIES ALSO TO OTHER CASES IS A QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

The Court of Appeals in its opinion regarding this case held that the order in Calley v. Callaway, supra, granting leave to dispense with printing of portions of the appendix to a petition for a writ of certiorari applied to that case alone. In Calley this Court in granting the motion did not limit the application to that case alone but by stating in detail without an in forma pauperis stipulation in the order itself that legible typewritten or otherwise reproduced copies of nonprinted court opinions may be submitted with respect to a petition for a writ of certiorari indicated the possibility of application also to other cases. The application to other cases would not nullify the requirements of Rule 39 (1) for all cases regarding appendix material. Separate volume

appendices accompanying briefs on the merits would still be subject to Rule 39. Copies of court orders and nonprinted court opinions on other size sheets than the main text pages could be submitted as attachments with respect to a petition for a writ of certiorari or be submitted separately bound depending upon circumstances.

It is not the case, as mentioned in the opinion of the Court of Appeals, that "[petitioner's] attempt to rely on a state court 'deadline' in the motion relating to the petition for [a writ of] certiorari had no merit because the 'deadline' was passed before the [respondents] received the motion and thus could not excuse the failure to comply with Rule 39." It is not controlling when the respondents received the motion. The motion was submitted on December 13, 1976, before petitioner completed his petition for leave to appeal to the Supreme Court of Illinois regarding another case, which petition he was granted leave to file by the Supreme Court of Illinois in January 1977. It is not the case, as mentioned in the opinion, "[a]nd the statement in the motion relating to the jurisdictional statement that similar documents had been accepted in an earlier case was irrelevant since from the docket number assigned to the earlier case, those documents appear to have been accepted before the Court's warning in Snider was issued." Following its ruling in Snider v. All State Administrators, Inc., supra, this Court in Calley v. Callaway, supra, granted a motion to dispense with printing of portions of the appendix.

The question of whether this Court's holding in Calley applies also to other cases with or without a motion is a question which should be settled by this Court.

CONCLUSION

The question of whether the duties of respondents to file papers generally are ministerial in nature is a question of law which the United States Court of Appeals for the Seventh Circuit has decided with respect to this case in conflict with decisions of other courts of appeal, and the question of whether there was a plain duty on the part of respondents to file any of petitioner's papers is a question of law which the United States Court of Appeals for the Seventh Circuit has decided in conflict with a decision of this court. The question of whether this court's holding in Calley v. Callaway, supra, applies also to other cases is a question which should be settled by this court. This case directly involves some of the procedures and rulings of this court. For the reasons which have been set forth, certiorari should be granted.

Respectfully submitted,

Gregory Panko
1352 North Bell Avenue
Chicago, Illinois 60622

APPENDIX A

Constitutional and Statutory Provisions

Appendix A

Constitutional and Statutory Provisions

Constitution of the United States, Amendment 5 in part:

> ...nor shall any person ... be deprived of life, liberty, or property without due process of law; ...

28 U.S.C., Section 956:

> The clerk of each court and his deputies and assistants shall exercise the powers and perform the duties assigned to them by the court.

28 U.S.C., Section 1331 in part:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

28 U.S.C., Section 1332 in part:

> (a) The district courts shall have original jurisdiction of all civil

actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

...

(d) The word "States" as used in this section includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C., Section 1361:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

U.S. Supreme Court Rule 13 (2):

Counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case will then be placed on the docket,

U.S. Supreme Court Rule 21 (3) in part:

Counsel for the petitioner shall file with the clerk of this court, with proof of service as provided by Rule 33, forty copies of a petition which shall comply in all respects with Rule 23 and shall enter his appearance and pay the docket fee. The case will then be

placed on the docket. ...

U.S. Supreme Court Rule 39 in part:

1. All appendices, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches, except that appendices in patent cases may be printed in such size as is necessary to utilize copies of patent documents.

U.S. Supreme Court Rule 53 (5):

5. While making due allowance for cases presented under this rule by persons appearing pro se, the clerk will refuse to receive any motion for leave to proceed in forma pauperis when it and the papers submitted therewith do not comply with the substance of this court's rules, or when it appears that the accompanying papers are obviously out of time.

APPENDIX B

Copies of Orders and Opinions of Courts

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 77 C 4228 Date July 5, 1978

Title of Cause Panko v. Rodak

Brief Statement of Motion Order

/s/ Leighton, J.
07 JUL 1978

This case is dismissed in its entirety pursuant to defendants' motion. [See Memorandum Order for Details]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GREGORY PANKO, Plaintiff,	)	77 C 4228
vs.	)	
MICHAEL RODAK, JR., et al., Defendants.	)	Before the Honorable George N. Leighton United States District Judge

Memorandum Order

Plaintiff Gregory Panko files this suit against Michael Rodak, Jr., Clerk of the Supreme Court of the United States, and Edward C. Schade, Assistant Clerk of the Supreme Court

of the United States. From the allegations of the complaint, it appears that on more than one occasion plaintiff forwarded a jurisdictional statement and petition for writ of certiorari to defendants, which were returned to plaintiff for failure to comply with the printing requirements of Supreme Court Rule 39. After an exchange of correspondence between plaintiff and the defendant clerks, plaintiff submitted motions to dispense with the printing requirements of the rule. Plaintiff now sues defendants for their failure to docket the documents forwarded to them and their failure to forward the motions to dispense with the printing requirements to the Justices of the Supreme Court for ruling. Plaintiff asks that a mandamus issue directing defendants to docket plaintiff's petition for writ of certiorari and jurisdictional statement or, in the alternative, to submit the respective motions to dispense with printing to the Justices of the Supreme Court for ruling. In addition, plaintiff asks for damages in excess of $10,000. Jurisdiction for this action is invoked pursuant to 28 U.S.C. Sections 1361, 1331, and 1332. The cause is before the court on defendants' motion to dismiss for failure to state a claim and for want of jurisdiction pursuant to Rule 12, Fed.R.Civ.P.

In accordance with defendants' motion, this court holds that this a proper case for extension of judicial or quasi-judicial immunity to defendants. Defendants are non-judicial personnel who like judges must not be unduly inhibited in the exercise of discretionary authority to return documents not in conformity with the rules by the constant

fear of personal liability for damages. Accordingly, this court holds them immune from suit for damages. See Smith v. Rosenbaum, 460 F. 2d 1019 (3d Cir. 1972); Davis v. McAteer, 431 F. 2d 81 (8th Cir. 1970); Brown v. Dunne, 409 F. 2d 341 (7 Cir., 1969); Zimmerman v. Spears, 428 F. Supp. 759 (W.D. Tex. 1977). The only remaining issue is whether plaintiff is entitled to mandamus.

Mandamus is an extraordinary remedy reserved for extraordinary causes and is to be issued only in the most compelling of cases. See Platt v. Minnesota Min. & Mfg. Co., 376 U.S. 240 (1964); Carter v. Seamans, 411 F. 2d 767, 773 (5 Cir. 1969). Three elements are applicable to test the appropriateness of granting mandamus: (1) a clear right to the relief sought; (2) a plainly defined and preemptory [sic] duty on the part of the defendant to do the act in question; and (3) unavailability of another adequate remedy. See Holmes v. United States Bd. of Parole, 541 F. 2d 1243, 1247 (7the [sic] Cir. 1976). In light of plaintiff's failure to provide defendants with a petition in conformity with Supreme Court Rule 53 and the discretionary authority vested in defendants, plaintiff has failed to establish a clear, ministerial, and nondiscretionary authority on defendants' behalf. Accordingly, the claim for mandamus is dismissed.

So ordered

/s/ George N. Leighton
George N. Leighton, United States District Judge

Dated: July 5, 1978

Typewritten Order
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 1, 79

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

GREGORY PANKO, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-2206 vs.	)	
MICHAEL RODAK, JR., Individually and as Clerk of the Supreme Court of the United States, and EDWARD C. SCHADE, Individually and as Assistant Clerk of the Supreme Court of the United States, Defendants-Appellees.	)	
	)	No. 77-C-4228 George N. Leighton, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-2206

GREGORY PANKO,

Plaintiff-Appellant.

v.

MICHAEL RODAK JR., Individually and as Clerk of the Supreme Court of the United States, and EDWARD C. SCHADE, Individually and as Assistant Clerk of the Supreme Court of the United States,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-4228—George N. Leighton, Judge.

SUBMITTED JULY 31, 1979—DECIDED AUGUST 1, 1979*

Before SWYGERT, CUMMINGS and WOOD, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Plaintiff Gregory Panko appeals from the judgment of the district court dismissing his *pro se* action for mandamus and damages.[1] The

* This appeal was originally decided by unreported order on August 1, 1979. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

[1] After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The

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defendants are the Clerk and an Assistant Clerk of the Supreme Court of the United States. We affirm the district court's judgment.

This case arises out of Panko's attempts to obtain Supreme Court review of the decisions in two other lawsuits he is prosecuting *pro se*, one from this Court and one from the Illinois courts. The defendants returned Panko's petition for certiorari in the federal case and jurisdictional statement in the state case for failure to comply with Supreme Court Rule 39 regarding the printing of documents submitted to the Court. Apparently parts of the appendixes to each document had been reduced in size through photo-copying and failed to comply with the print-size requirements. S. Ct. Rule 39(1).

In each case Panko resubmitted the documents, without change, along with a motion to dispense with the printing requirements. In the motion to dispense with printing as to the petition for certiorari Panko relied on the fact that a similar motion was granted by the Court in *Calley v. Callaway*, 423 U.S. 888 (1975), *cert. denied sub nom. Calley v. Hoffman*, 425 U.S. 911 (1976), and stated that he had a January 5, 1977 deadline to meet for filing a petition in the Illinois Supreme Court. This motion to dispense with printing in the United States Supreme Court was not received at the Clerk's office until February 18, 1977, however.[2]

In the motion to dispense with printing as to the jurisdictional statement, Panko again relied on *Calley, supra*, and stated that his jurisdictional statement in an earlier appeal to the Court[3] had been accepted by the

[1] *continued*
notice provided that any party might file a "Statement as to Need for Oral Argument." See Rule 34(a), Fed. R. App. P. (effective Aug. 1, 1979); Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

[2] In this complaint, Panko alleged that delivery of this motion to the Court was attempted on December 18, 1976, but was unsuccessful.

[3] *Panko v. Donovan*, 415 U.S. 953 (1974) (that appeal carried a 1973 docket number).

Clerk's office for filing despite the attachment of materials similar to those attached to the jurisdictional statement at issue here.

The defendants again returned the petition for certiorari and the jurisdictional statement as well as the motions to dispense with printing without filing any of them and without submitting the motions to the Court for decision.

Panko then filed suit in the district court seeking mandamus under 28 U.S.C. § 1361 directing the defendants to file his petition for certiorari and jurisdictional statement or to submit the motions to dispense with printing to the Court for decision.[4] The complaint also sought damages. The district court granted defendants' motion to dismiss. The court held that defendants were protected from damage liability by absolute judicial or quasi-judicial immunity. The court further held that Panko had failed to allege a clear right to the mandamus relief sought.

In order to obtain mandamus relief, Panko was required to establish three elements: a right to have his papers filed or submitted to the Court; a plainly defined and peremptory duty on the part of the defendants to file or submit them; and the absence of any other adequate remedy. *Trinity Mem. Hosp. v. Associated Hosp. Serv., Inc.*, 570 F.2d 660, 666 n. 9 (7th Cir. 1977); *Holmes v. United States Bd. of Parole*, 541 F.2d 1243, 1247 n. 5 (7th Cir. 1976) (overruled in part not pertinent to this point in *Solomon v. Benson*, 563 F.2d 339 (7th Cir. 1977)). As the district court held, Panko's complaint failed to allege the first two elements.

Although the petition for certiorari and jurisdictional statement submitted for filing are not included in the record in this appeal, the allegations of the complaint

[4] Section 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

show that parts of the appendixes to these documents had been reduced in print size and failed to comply with the Court's Rule 39. Thus, Panko had no right to have these documents filed. In addition, the Supreme Court's order in *Snider v. All State Administrators, Inc.*, 414 U.S. 685 (1974), places a duty upon the defendants to reject any document subject to Rule 39 which fails to comply with the Rule. Therefore, the defendants had no plainly defined and peremptory duty to file Panko's petition for certiorari or jurisdictional statement. See Stern and Gressman, Supreme Court Practice § 6.23, pp. 448-453 (5th ed. 1978) (hereinafter Stern & Gressman).

Nor did Panko have a clear right to have his motions to dispense with printing submitted to the Court. In *Snider v. All State Administrators, Inc., supra*, the Court denied such a motion, noting that no motion and affidavit to proceed *in forma pauperis* had been filed. The Court said that "generalized allegations of inability to afford" printing costs were insufficient and that motions based on such allegations were disfavored. The Court did say that it has authority to waive its rules "in appropriate circumstances." But the Court went on to say that it is not disposed to waive the printing requirements.

The leading treatise on practice before the Court has interpreted *Snider* to mean that the printing requirements will not be waived without a motion sufficient to establish a "right to proceed *in forma pauperis*." Stern & Gressman at 451. Regardless of whether the Court might find other "appropriate circumstances" justifying waiver of the printing requirements, Panko's motion made no attempt to allege such circumstances and was insufficient on its face.

Panko's reliance in both motions on *Calley v. Callaway, supra*, 423 U.S. 888, was patently meritless. The order in *Calley* granting leave to dispense with printing portions of the appendix in that case was based on the circumstances presented in the motion in that

case and applied to that case alone.[5] Panko's interpretation of *Calley* as a general rule permitting the filing of any "legible" appendix material is impermissible because it would nullify the requirements of Rule 39(1) for all cases. His attempt to rely on a state court deadline in the motion relating to the petition for certiorari had no merit because the deadline was passed before the defendants received the motion and thus could not excuse the failure to comply with Rule 39. And the statement in the motion relating to the jurisdictional statement that similar documents had been accepted in an earlier case was irrelevant since from the docket number assigned to the earlier case, those documents appear to have been accepted before the Court's warning in *Snider* was issued.

The Court's rules make it clear that motions which are insufficient on their face will not be filed by the Clerk's office. See *e.g.* S.Ct. Rule 53(5). Thus Panko had no clear right to have his motions submitted to the Court. These rules also establish that defendants had no duty to submit Panko's facially insufficient motions.

In sum, Panko has failed to allege a clear right to have his papers filed or a plain duty on the part of the defendants to file them. Therefore, the district court properly denied mandamus relief.[6]

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[5] The motion to dispense with printing in *Calley* stated that there were four lower court opinions in that case totalling 263 pages. These opinions appeared in published reporters, such as Federal Reporter Second and Federal Supplement which do not meet Rule 39's print-size requirement and would have required reprinting. Stern & Gressman at 452. The motion in *Calley* further stated that the costs of such printing "would place an insurmountable financial burden on your Applicant who has limited funds and who has virtually exhausted those funds in the proceedings below. Indeed, Applicant will be pauperized unless the said requirements are dispensed with."

[6] The district court did not address the issue raised by the defendants whether a district court has jurisdiction over a mandamus action against clerks of the Supreme Court. Although there seems to be no authority other than the dis-

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The district court also correctly held that the defendants are immune from Panko's claim for damages. The administration and control of the Court's docket are part of the Court's judicial function. And in enforcing the Court's Rules, see S.Ct. Rules 39(4) and 53(5), and executing the Court's directives regarding the docketing of cases, see *Snider, supra*, the defendants were carrying out judicial or quasi-judicial functions within their authority. Therefore, the defendants are entitled to judicial immunity from damage liability for their actions. *Brown v. Dunne*, 409 F.2d 341, 343 (7th Cir. 1969). Furthermore, the discussion above shows that Panko had no right to have his papers filed or submitted which

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trict court case cited by the defendants, *Barrow v. North Carolina*, 374 F.Supp. 1249 (W.D. N.C. 1974), which is not directly on point, it seems axiomatic that a lower court may not order the judges or officers of a higher court to take an action. Section 1361 seems to grant jurisdiction; but, if read literally, the language of § 1361 would allow a district court to issue mandamus directly against the Justices of the Supreme Court themselves. Perhaps this difficulty is best analyzed as going to the district court's discretion to refuse mandamus relief even if the elements justifying relief had been established. See *Holmes v. United States Bd. of Parole, supra*, 541 F.2d at 1247. Such an analysis would recognize the difficulty or impossibility of enforcing an order should the Supreme Court direct the Clerk's office to ignore it. It would recognize also the unseemliness of a district judge interfering in the policies and procedures which the Court has adopted to minimize the practical difficulties of dealing with its substantial caseload. See Stern & Gressman at 38-51; cf. *id.* at 680-681 (regarding the need for, and concern of the Clerk's Office for, uniformity in printing appendixes). These considerations of judicial discretion provide an alternate basis for affirming the district court's denial of mandamus relief. In addition, analyzing the doubts about the district court's power to entertain a petition for mandamus against officers of a higher court in terms of judicial discretion leaves open the possibility of such relief if it could ever be shown, for example, that a clerk of a higher court unjustifiably refused to docket a case and then unreasonably blocked all attempts to obtain relief from that refusal from the higher court itself. In this case, as discussed above, both the refusal to docket Panko's cases and the refusal to submit his motions to the Court were fully justified.

the defendants could have violated; and that the defendants had no duty to file or submit the papers which could have been breached. Thus regardless of the defendants' immunity, Panko had no right to damages from the defendants.

Accordingly, the judgment of the district court is affirmed.

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